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# It's Not my Problem? Wrong: Prosecutors Have an Important Ethical Role to Play

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# **“It’s Not My Problem?” Wrong: Prosecutors Have an Important Ethical Role to Play**

Rory K. Little\*

The scenario posed by Professor Batey for this “mini-symposium” is played out more often than we might care to admit. A person arrested with drugs offers to “cooperate” against a figure the arrestee says is a bigger fish. Call the arrestee the “cooperator.” Who knows if she is telling the truth—and more importantly, who *decides* that question and how does it affect lawyers’ actions? The dearth of clear and specific ethical guidance for the defense attorney here is surprising, and makes Professor Batey’s efforts here a real public service. But, at least to this former prosecutor and current ABA Reporter on Prosecutorial Standards,<sup>1</sup> the scenario is incomplete: where is the prosecutor? And more relevantly for current purposes, what guidance is available for the *prosecutor’s* ethical performance in this scenario?

Too often, legal ethicists pose hypothetical questions for only one actor in our legal system.<sup>2</sup> But, for better or worse, we operate within a criminal justice

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<sup>1</sup> In 1999, I published an article bemoaning the lack of specific ethical guidance for prosecutors operating in the now-common investigative context. Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 738–46 (1999). In response to the issues raised there, in 2002 the ABA Standards Committee formed a Task Force to formulate new Criminal Justice Standards for the Prosecutor Acting as Investigator (I served as a member of that Task Force, chaired by Ronald Goldstock and the Reporter was Steven Solow), leading to the ABA’s 2008 adoption of new Criminal Justice Standards on the topic. See ABA CRIMINAL JUSTICE STANDARDS ON PROSECUTORIAL INVESTIGATIONS, *available at* <http://www.abanet.org/crimjust/standards/pinvestigate.html> [hereinafter PROSECUTORIAL INVESTIGATIONS STANDARDS]. The Prosecutorial Investigations Standards are reprinted as an Appendix to this essay, the first “hard copy” printing of them in any forum, *infra* at 694.

Meanwhile, in 2005, the ABA Standards Committee formed a different Task Force to recommend revisions to the entire set of the existing ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993). I have served as Reporter to that Task Force (chaired by the Honorable John R. Tunheim, United States District Court Judge for the District of Minnesota) from its inception, and the Task Force’s proposals are currently being considered within the ABA.

<sup>2</sup> Although the scenario we address here is hardly hypothetical. See, e.g., *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (*en banc*), in which the prosecution granted immunity to an informant and made him its “star witness,” who then perjurally (it seems) testified that Carriger had committed a murder which, in fact, the informant apparently had committed. *Id.* at 482. Carriger was not relieved from his death penalty until the second *en banc* decision of the Ninth Circuit, nineteen years later. Whether the informant (described as a “habitual liar with a sociopathic personality”) had a lawyer and whether that lawyer knew or suspected that his client’s testimony was

system,<sup>3</sup> and the actions of every actor are inevitably affected by the actions of others. Defense counsel does not, and should not, operate in a vacuum in this scenario. The prosecutor has an important role to play, both in advising the arrestee and her counsel to allow them to make their own choices, and in preventing injustice to the extent she properly can.<sup>4</sup>

This scenario provides an opportunity to take note of the new Criminal Justice Standards<sup>5</sup> on Prosecutorial Investigations, adopted by the ABA in February 2008 and still not yet published with full Commentary.<sup>6</sup> It also permits us to consider the ethical interaction between defense and prosecution lawyers. Such interaction, I submit, is a good and healthy thing—yet often ignored in a too-hostile “we versus they” approach to the practice of criminal law. Finally, I submit that the judiciary has a role to play here too—and that all three players need to consider their functions and roles in a system for which *legislators* often mandate sentencing regimes and other incentives that deeply affect the process as well as the end result.

In brief, I submit that the prosecutor in this scenario has ethical obligations to:

1. Advise defense counsel and the arrestee fully of the potential consequences of their decisions and actions here;

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perjurious, is not reported. *Id.* at 466. Regardless, the Court held that “[w]hen the state decides to rely on the testimony of such a witness, it is the state’s obligation” to investigate the informant and learn of adverse information. *Id.* at 480.

<sup>3</sup> The for-worse side of having a criminal justice “system” was disturbingly described in Tom Wolfe’s classic *The Bonfire of the Vanities* 104–32 (1987).

<sup>4</sup> “Properly” means within the bounds of existing lawyer ethics rules. For example, a vexing question for prosecutors which I address here only in passing is what should a prosecutor do if s/he believes that a defense counsel is acting ineffectively, and not accurately or fully conveying the prosecutor’s communications to the defendant? *See* text after n. 11, *infra*. ABA Rule of Professional Conduct 4.2 forbids the prosecutor to contact the defendant directly except in narrow circumstances, and the Sixth Amendment likely forbids interference with the defendant-counsel relationship. Similarly, obligations of confidentiality may prevent a prosecutor from conveying some information to the defense that the defense would like to have—another issue I do not address here.

<sup>5</sup> In a project begun in 1964 under then ABA-President (and future U.S. Supreme Court Justice) Lewis Powell, the ABA publishes Criminal Justice “Standards” to guide lawyers on various criminal justice topics. For many years, the Standards project has been ably assisted by Susan Hillenbrand of the ABA’s Criminal Justice section, and there are currently 23 “Titles,” or different sets of standards, with others currently under consideration. *See* ABA Criminal Justice Section, *Criminal Justice Standards*, <http://www.abanet.org/crimjust/standards> (last visited Apr. 12, 2010). Although the Standards have no binding authority until and unless adopted as law by a particular jurisdiction, they have been persuasive and influential in American courts of all levels, including the United States Supreme Court. *See, e.g.,* *Bonin v. California*, 494 U.S. 1039, 1041 (1990) (Marshall, J., dissenting); *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>6</sup> *See* PROSECUTORIAL INVESTIGATIONS STANDARDS, *supra* note 1; *see also* *Criminal Justice Standards*, *supra* note 5 (“Commentary to these Standards is currently being developed and once it is approved by the Standards Committee will accompany these ‘black letter’ Standards in a published volume.”). Also, *see* the Appendix to this Essay, *infra* at 694.

2. Demand cooperation not just about the "kingpin," but about the supplier(s) of the specific drugs found on the arrestee, and all other relevant matters;
3. Not agree to any reduced charge or sentence<sup>7</sup> without first obtaining truly independent and incriminating corroboration of the arrestee's proposed testimony, and being personally convinced that the testimony is *true*; and
4. Not proceed further without the first three items.

All this is to say that the defense attorney is hardly the sole, or even primary, guarantor of truth and justice here. Indeed, within the American context of an adversary system with zealous Sixth-Amendment-protected defense lawyers, one may argue (and my fellow contributors undoubtedly have) that the defense lawyer is not supposed to guarantee truth at all. If the "system" is to work as the average American thinks it should—and it is that largely non-lawyer American "public" that the prosecutor, and not the defense attorney, represents—then the prosecutor, (as well as the judge) has a major role to play in our not-really-hypothetical scenario.

#### I. THE PROSECUTOR'S GENERAL ROLE

Two aspects of the prosecuting attorney's role are vital for the ethical success of the American criminal justice system. First, the American prosecutor is a public prosecutor: s/he represents "the public," not any single individual and certainly not law enforcement interests alone.<sup>8</sup> And second, the prosecutor has some general duty to work toward truth, fairness, and "just" results. Thus the new ABA Investigations Standards echo other authorities in beginning with a general

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<sup>7</sup> Our hypothetical does not explain how the prosecutor can guarantee a reduced sentence, as opposed to recommend it to the judge. Federal Rule of Criminal Procedure 11(c)(1)(C) allows such an agreement, but only if the judge agrees. In this aspect, the judicial officer has an important ethical role to play: not accept a guilty plea and a required-reduced sentence without a substantial basis for believing that the "deal" is a fair and honest one. See ABA CRIMINAL JUSTICE STANDARDS ON PLEAS OF GUILTY § 14-3.3 ("Responsibilities of the Judge").

<sup>8</sup> PROSECUTORIAL INVESTIGATIONS STANDARDS, *supra* note 1, § 1.2(b). As is true of any legal question, whether "the public" is the correct description of the prosecutor's "client" is arguable (and parenthetically, I ask my students never to use the word "arguable," because virtually any legal assertion is "arguable"—the adjective tells us nothing). Certainly American ethical authorities have for decades, if not centuries, agreed that public prosecutors represent interests broader and less individualized than their own or than law officers'. I prefer to describe the prosecutor's client as "the public, acting through its designated representatives," to ensure that prosecutors generally follow a supervisory hierarchy and seek guidance through our chosen democratic selection mechanisms rather than simply public opinion polls or their personal, individual conceptions of "justice."

principle that “the primary duty” of the prosecutor, even in the largely non-public, confidential investigative stage, “is to seek justice.”<sup>9</sup>

But, with apologies to respected “Minister of Justice” advocates, this general principle is hardly sufficient to guide prosecutors in any useful, specific way.<sup>10</sup> It is all well and good to say that a prosecutor is a “minister of justice,” but “justice” is individualistically, and thus unacceptably manipulably, different in the eyes of different beholders. That is, some might argue that a “just” result here is simply the conviction and removal from our streets of the “drug kingpin,” and so long as we are “certain” of his badness, a little perjury along the way is not such a bad thing in proportion to the harm he has done and will do to society. A duty to “seek justice” is too vague, and too result-oriented, to satisfy us in most specific situations. Prosecutors are human, and need more specific guidance than that if their humanity is to be cabined in furtherance of truth and justice.

## II. THE PROSECUTOR’S DUTY TO ACCURATELY ADVISE ABOUT UNPLEASANT REALITIES

Our profession has (for reasons that in my view are sometimes more self-interested than just, although that’s a different article<sup>11</sup>) rules that prohibit direct communication from the prosecutor to the arrestee who is represented by counsel, as this one is. Within the context of those rules, I think a prosecutor’s first duty in this situation is to make sure the potential cooperator is advised as accurately as possible about what she may be getting into. That is, the prosecutor needs to convey a few important things to the arrestee (or her counsel, assuming honest communication between counsel and client<sup>12</sup>), before going further with the deal.

First, “in for a penny, in for a pound.” That is, once “cooperation” is on the menu, it has to be complete, and no topic will be out of bounds. “Full” cooperation means full, and line-drawing—between, just for example, the supplier on the deal she got arrested for, and the “drug kingpin” she’s offering testimony on; or between her own sordid history of drug-dealing, with anyone and everyone,

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<sup>9</sup> PROSECUTORIAL INVESTIGATIONS STANDARDS, *supra* note 1, § 1.2(a).

<sup>10</sup> What fun is a law review symposium without a little academic-rivalry spice? My friends and more prolific colleagues, Bruce Green and the late Fred Zacharias, have championed the “Minister of Justice” concept. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 612 n.8, 613 n.17 (1999); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991). I don’t so much disagree with what they say about that concept as I think it inadequate to be of much help in any particular real-world criminal justice situation.

<sup>11</sup> That is, I believe that Rule 4.2 is often self-interestedly employed to protect lawyers’ financial interests in not losing their clients via outside interference. See Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 803–04 (2009) (noting that “the Rule can also serve less legitimate interests of the lawyer”). On Rule 4.2 in the criminal law context, see generally Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996).

<sup>12</sup> See *supra* note 4.

and the kingpin's—is not permitted. And all that information could end up being used against her. So the decision to “come over to the other side” has to be a complete one. Don't think you can “protect” yourself or others by telling the prosecutor selective versions or portions of your world. Your world is now our world.

Second, her information must be entirely truthful. That's two words. Truthful. And entirely. Lies about anything, even small details, won't be tolerated. And “misremembering” is likely to be considered lying, so don't lie now and then try later to claim “I misremembered” if caught. Further, being caught lying will void the deal, and almost certainly lead to more time in prison and possibly additional perjury or obstruction of justice felony charges.

Third, “the prosecutor is not your friend.” He does not like you and he does not trust you. He will be very angry if you lie, and will enjoy putting you in prison for it. And he will be actively seeking corroboration for everything you say. Not to mention the efforts that the kingpin's lawyer will employ to try to prove you are a liar—and the prosecutor will be listening to the kingpin's lawyer as actively as he listens to yours.<sup>13</sup> Discovery of “corroboration” that does not corroborate, but rather contradicts, will lead to much worse consequences for you.<sup>14</sup>

The prosecutor should give all this advice to the defense attorney, even if the experienced defense attorney may be assumed to know it, and expressly demand that it be conveyed to the arrestee. A written letter, perhaps one that is developed as somewhat “standard” for the prosecutor's office and then “tweaked” for each individual case, might be considered. Moreover, to ensure that the defendant hears all of this personally, I would recommend a personal meeting (with defense counsel present) at which the arrestee's presence is *required*, at which the prosecutor conveys this information without pulling any punches. (This also avoids a later claim that defense counsel failed to convey the information. As I instruct at every prosecutor's ethics seminar, good ethics is also always good strategy. When teaching prosecutors, I challenge them to come up with real-life examples in which following the best ethical course leads to strategic downfall. I have yet to hear an example that holds water.)

### III. COOPERATION SHOULD BE “FULL” AS WELL AS ENTIRELY TRUTHFUL

A prosecutor should not allow a cooperator to define the contours of the cooperation. The public's interest should demand full cooperation about the cooperator's entire criminal history, as well as truthfulness in every aspect. Again, this is not just good ethics but also good strategy. The kingpin's lawyer will work

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<sup>13</sup> Thus the new Investigations Standards stress that the prosecutor should “reevaluate” his judgments about who is credible, and “the veracity” of all witnesses as well as their “accuracy and completeness” “throughout the course of the investigation.” PROSECUTORIAL INVESTIGATIONS STANDARDS, *supra* note 1, §§ 1.4(a)(1)–(2).

<sup>14</sup> See “Second,” in the preceding paragraph.

doubly hard to impeach the prosecution's star witness. There shouldn't be any "surprises" on the stand. For example, our hypothetical doesn't mention that the prosecution will receive any information about the drug dealing in which the arrestee was caught red-handed. But that should be the first order of business here: complete truthful information about the arrestee's own criminal conduct, as well as naming names (and/or providing identifying details) about anyone else involved. Or there is no deal.

In this regard, the new Investigations Standards say two very important things. First, before entering any deal, the prosecutor must consider the very real incentives the arrestee has to provide false, incomplete, or misleading information.<sup>15</sup> Such falsity could include seeking to inculcate the innocent, as well as exculpate (or just leave out) others who in fact have culpability (e.g., the arrestee's friends, relatives, lovers, or dangerous but as yet unknown bosses). And although our hypothetical does not give specific sentencing numbers, in the federal system the legislated ability to avoid inflexible mandatory minimums only by providing "substantial assistance" creates very large, even if understandable, incentives to lie.<sup>16</sup>

Although the Standards don't go on to discuss consequences, the logical implication is that, when the incentives to lie are large and the lack of independent corroborating evidence is persistent, some deals for testimony simply should not be made. "[T]he prosecutor should be satisfied as to the truthfulness of the cooperator."<sup>17</sup> At some point, the prosecutor's ethical duty is to reject proffered testimony from a would-be cooperator, even when the target is "attractive" in some law enforcement view, when the potential for false testimony is too large and certainty of truthfulness cannot be reasonably assured. Prosecuting the violent gangster Al Capone on relatively modest tax charges is fine. Prosecuting him by using possible perjury is unethical.

Second, the prosecutor should "seek to have the cooperator plead guilty to an *appropriate* criminal charge."<sup>18</sup> This naturally includes assessment of the appropriate *sentence*, if sentence is part of the agreement (as in our hypothetical). Appropriateness, like justice, is in the eye of the beholder, and reasonable prosecutors will sometimes disagree. But no deal should be offered until a full assessment of the cooperator's own criminality has been made. Thus the

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<sup>15</sup> PROSECUTORIAL INVESTIGATIONS STANDARDS, *supra* note 1, § 2.4(c).

<sup>16</sup> See, e.g., Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 926-27 (1999); Ronald Weich, *The Battle Against Mandatory Minimums: A Report from the Front Lines*, 9 FED. SENT'G REP. 94 (1996); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993). This is one flaw, with anti-law enforcement effects, in legislatively-mandated mandatory-minimum sentencing regimes that law and order advocates appear not to perceive. Prosecutors have no special divine talent for "knowing" the truth, and mandatory minimums sometimes unacceptably skew the criminal justice system's ability to accurately determine true, and relative, criminality.

<sup>17</sup> PROSECUTORIAL INVESTIGATIONS STANDARDS, *supra* note 1, § 2.5(k).

<sup>18</sup> *Id.* § 2.5(b) (emphasis added).



Investigations Standards direct that before offering "significant benefits," a prosecutor should determine "the culpability of other participants in the criminal activity *relative* to the cooperator's culpability . . . as accurately as possible."<sup>19</sup>

This makes the "dance" between defense counsel and the prosecutor, prior to signing a final cooperation bargain, dangerously intricate. The prosecutor should not agree to anything specific until a full assessment of criminal culpability, including relative criminal culpability, is made. Meanwhile, defense counsel does not want to give up information about his client that is highly incriminating without an enforceable promise of some significant benefit, assuming truthfulness. The dance is not just a "two-step" but an intricate back and forth, each side moving a bit closer to the other with each exchange, and often conducted via *hypothetical* proffers that cannot easily be attributed to the cooperator personally until the deal is sealed. Trust between the lawyers is essential to this process.

And for lawyers who are "repeat players," as criminal prosecutors and defenders often are, a determination that a lawyer cannot be trusted in a particular deal can be fatal to the overall effectiveness of that lawyer for a long, long time. Thus, to state what I hope is obvious, honesty and fair-dealing between counsel is essential to this process, for strategic, not to mention ethical, reasons. The prosecutor has an obligation not to mislead defense counsel as to the likelihood of a deal or particular sentence, simply to gather information. And the prosecutor has an obligation to honestly enter into a deal, once defense counsel has proceeded some incriminating distance down the road in reliance, assuming all stated preconditions are met.

#### IV. INDEPENDENT, AND INDEPENDENTLY INCRIMINATING, CORROBORATION SHOULD BE REQUIRED

Cognizant of space limitations, let me just say that no cooperation deal should ever be the basis for a prosecution without independent corroborating evidence. That is, while a prosecutor might ethically enter into a cooperation deal solely for investigative, intelligence-gathering purposes, such a deal should not be entered into as the basis for a prosecution unless truly independent corroborating evidence is obtained, and that evidence is itself incriminating of the target. This can be time-consuming, but prosecutors should not ethically buy a cooperator's "pig in a poke," simply hoping that corroboration will later be obtained or based solely on a "we all know it" type of knowledge that the ultimate target of the prosecution is dirty.

Moreover, there is a difference between corroborating evidence that is truly independent of a cooperator's information, and evidence that corroborates but is itself intertwined with the "cooperation." Moreover, the corroboration should be *incriminating* of the target—simply corroborating non-incriminating details of the corroborator's testimony is a pretty thin reed on which to base a prosecution.

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<sup>19</sup> *Id.* § 2.5(c)(7) (emphasis added).

More can be said about this, and I have in the capital context.<sup>20</sup> But space limitations here control, and each case will differ factually as to what “counts” as solid corroboration. I hope the general point is clear: no truly independent corroboration, no deal. The possibility of perjury, and thus error and injustice, is too high.

#### V. THE JUDGE’S ROLE

Even less is written about the judge’s ethical role in criminal matters, than about the prosecution. The Model Code of Judicial Conduct says nothing that is relevant in any specific way here.<sup>21</sup> Briefly, let me assert that the judge ought *not* be a potted plant. While federal judges are told in Federal Rule of Criminal Procedure 11(c)(1) not to participate in plea discussions, they are also told to “determine that there is a factual basis for the plea” (Rule 11(b)(3)), and they may reject a plea agreement they find not to be in the public interest (Rule 11(c)(5)).<sup>22</sup> I think this gives a judge latitude to inquire (*in camera* if necessary) as to the fairness of a cooperation deal, and even into the relative culpability of a would-be cooperator versus the ultimate targets of the prosecution. Of course, there are serious separation of powers concerns here, and it is the Executive whose constitutional obligation is to ensure that the laws are faithfully executed. Nevertheless, and particularly if anything specific should occur that might raise questions about the deal, I think a fair-minded judge has the right to, and should, make inquiries, and a fair-minded prosecutor has some obligation to respond.

#### VI. CONCLUSION

I don’t want to renege on the requested hypothetical questions: I think the defense counsel does have an ethical obligation to advise his client of all lawful ways to mitigate the consequences of her criminality, and I think defense counsel has an obligation not to assist knowingly in the presentation of false evidence. However, I think time has proven correct the view of many authorities, that one

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<sup>20</sup> See Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. U. L. REV. 965, 980 (2008).

<sup>21</sup> The ABA’s Model Code of Judicial Conduct was first adopted in 1972, and was revised in 2007. The most it says for our scenario is, in a comment, that a judge should “ensure impartiality and fairness to all parties.” MODEL CODE OF JUD. CONDUCT R. 2.2 cmt. 1 (2007). The ABA has said a little more about the “Responsibilities of the Judge” in its Pleas of Guilty Standards, § 14-3.3, but again, nothing specific regarding my suggestions in the text here. See *supra* note 7.

<sup>22</sup> See, e.g., *United States v. Samuelli*, 582 F.3d 988, 992 (9th Cir. 2009) (applying “interest of justice” standard to rejection of a Rule 11(c) plea agreement); *United States v. Moran*, 452 F.3d 1167, 1171–72 (10th Cir. 2006) (rejection of plea for lack of a factual basis, even if discovered after acceptance of the plea).

frequently never "knows,"<sup>23</sup> and that a client, once well and fully advised of the consequences, has a right to proceed as s/he thinks best. Although if the client's choice seems to be leading to perjury, defense counsel has an obligation to try to dissuade, because perjury will never be in the client's best interests in the long run.

But defense counsel is not the only actor in the system. The "right" ethical answer to hypotheticals like this are not unidimensional. They require a systematic review of all the actors, and the prosecutor's role is not to be ignored.

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<sup>23</sup> See Ellen Yaroshefsky, *My Client, the Cooperator, Lied: Now What?*, 7 OHIO ST. J. CRIM. L. 659 (2010); Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 142–48 (2008). As Professor Freedman has pointed out to me, this solution is more complicated than my oversimplification in the text, or the average ethicist, reveals. Professor Freedman long ago explained that "standards of 'knowing' have been manipulated in rules of lawyers' ethics" since the client perjury dilemma was first analyzed. *Id.* at 142 & n.43 (citing MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975)). In fact, Professor Freedman explains that lawyers "frequently . . . know" the truth, *id.* at 147—it is his position, however, that this ought not necessarily lead to the conclusion that client perjury must be revealed. *Id.* at 136, 152–61 (arguing that deliberate elicitation of such information, and then revealing it to the Court, is a constitutional Fifth and Sixth Amendment violation). Other committed ethicists are more comfortable reaching the same conclusion by maintaining that one never "knows" the truth sufficiently to reveal the criminal defendant's confidences.

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**ABA Criminal Justice Standards  
on  
Prosecutorial Investigations**

**Preamble**

A prosecutor's investigative role, responsibilities and potential liability are different from the prosecutor's role and responsibilities as a courtroom advocate. These Standards are intended as a guide to conduct for a prosecutor actively engaged in a criminal investigation or performing a legally mandated investigative responsibility, *e.g.*, serving as legal advisor to an investigative grand jury or as an applicant for a warrant to intercept communications. These Standards are intended to supplement the Prosecution Function Standards, not to supplant them. These Standards may not be applicable to a prosecutor serving in a minor supporting role to an investigation undertaken and directed by law enforcement agents.

**PART 1: GENERAL STANDARDS**

**STANDARD 1.1 THE FUNCTION OF THESE STANDARDS**

(a) These Standards address the *investigative* stage of the criminal justice process. They address the charge or post-charge stages of the criminal justice process only when those stages overlap with the investigative stage.

(b) These Standards are not intended to serve as the basis for the imposition of professional discipline, nor to create substantive or procedural rights for accused or convicted persons. These Standards do not modify a prosecutor's ethical obligations under applicable rule of professional conduct. These Standards are not intended to create a standard of care for civil liability, nor to serve as a predicate for a motion to suppress evidence or dismiss a charge.

(c) The use of the term "prosecutor" in these Standards applies to any prosecutor or other attorney, regardless of agency or title, who serves as an attorney in a governmental criminal investigation.

**STANDARD 1.2 GENERAL PRINCIPLES**

(a) An individual prosecutor is not an independent agent but is a member of an independent institution the primary duty of which is to seek justice.

(b) The prosecutor's client is the public, not particular government agencies or victims.

(c) The purposes of a criminal investigation are to:

(1) develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent, and

(2) develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution.

(d) The prosecutor should:

(1) ensure that criminal investigations are not based upon premature beliefs or conclusions as to guilt or innocence but are guided by the facts;

(2) ensure that criminal investigations are not based upon partisan or other improper political or personal considerations and do not invidiously discriminate against, nor wrongly favor, persons on the basis of race, ethnicity, religion, gender, sexual orientation, political beliefs, age, or social or economic status;

(3) consider whether an investigation would be in the public interest and what the potential impacts of a criminal investigation might be on subjects, targets and witnesses; and

(4) seek in most circumstances to maintain the secrecy and confidentiality of criminal investigations.

(e) Generally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation.

(f) The prosecutor should be aware of and comply with the ethical rules and other legal standards applicable to the prosecutor's conduct during an investigation.

(g) The prosecutor should cooperate with other governmental authorities regarding matters that are of legitimate concern to such authorities when doing so is permitted by law and would not compromise an investigation or other criminal justice goals.

(h) The prosecutor's office should provide organizational structure to guide its members' investigative work.

**STANDARD 1.3 WORKING WITH POLICE AND OTHER LAW ENFORCEMENT AGENTS**

(a) The prosecutor should respect the investigative role of police and other law enforcement agents by:

(1) working cooperatively with them to develop investigative policies; and

(2) providing independent legal advice regarding their investigative decisions.

(b) The prosecutor should take steps to promote compliance by law enforcement agents with relevant legal rules.

(c) The prosecutor should be aware of the experience, skills and professional abilities of police and other law enforcement agents assigned to an investigation.

(d) The prosecutor's office should assist in providing training to police and other law enforcement agents concerning potential legal issues and best practices in criminal investigations.

(e) Before and throughout the course of complex or non-routine investigations, the prosecutor should work with the police and other participating agencies and experts to develop an investigative plan that analyzes:

(1) the investigative predicate or information concerning the matter that is then known;

(2) the goals of the investigation;

(3) the potential investigative techniques and the advantages of each, singularly and in combination, in producing relevant information and admissible evidence; and

(4) the legal issues likely to arise during the investigation.

(f) The prosecutor should promote timely communications with police and other law enforcement agents about material developments in the investigation.

(g) The prosecutor should not seek to circumvent ethical rules by instructing or recommending that others use means that the prosecutor is ethically prohibited from using. The prosecutor may provide legal advice to law



enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use.

**STANDARD 1.4 VICTIMS, POTENTIAL WITNESSES, AND TARGETS DURING THE INVESTIGATIVE PROCESS**

(a) Throughout the course of the investigation as new information emerges, the prosecutor should reevaluate:

(1) judgments or beliefs as to the culpability or status of persons or entities identified as "witnesses," "victims," "subjects" and "targets," and recognize that the status of such persons or entities may change; and

(2) the veracity of witnesses and confidential informants and assess the accuracy and completeness of the information that each provides.

(b) Upon request and if known, the prosecutor should inform a person or the person's counsel, whether the person is considered to be a target, subject, witness or victim, including whether their status has changed, unless doing so would compromise a continuing investigation.

(c) The prosecutor should know the law of the jurisdiction regarding the rights of victims and witnesses and should respect those rights.

(d) Absent a law or court order to the contrary, the prosecutor should not imply or state that it is unlawful for potential witnesses to disclose information related to or discovered during an investigation. The prosecutor may ask potential witnesses not to disclose information, and in doing so, the prosecutor may explain to them the adverse consequences that might result from disclosure (such as compromising the investigation or endangering others). The prosecutor also may alert an individual who has entered into a cooperation agreement that certain disclosures might result in violation of the agreement.

(e) The prosecutor should not imply the existence of legal authority to interview an individual or compel the attendance of a witness if the prosecutor does not have such authority.

(f) The prosecutor should comply with applicable rules and case law that may restrict communications with persons represented by counsel.

(g) The prosecutor should not take into consideration any of the following factors in making a determination of whether an organization has been cooperative

in the context of a government investigation unless the specified conduct of the organization would constitute a violation of law or court order:

(1) that the organization has provided, or agreed to provide counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an employee;

(2) that the organization entered into or continues to operate under a joint defense or information sharing and common interest agreement with regard to the investigation;

(3) that the organization shared its records or other historical information relating to the matter under investigation with an employee; or

(4) that the organization did not sanction or discharge an employee who invoked his or her Fifth Amendment privilege against self incrimination in response to government questioning of the employee.

(h) The prosecutor should not interfere with, threaten, or seek to punish persons or entities seeking counsel in connection with an investigation, nor should the prosecutor interfere with, threaten or seek to punish those who provide such counsel unless by doing so such conduct would constitute a violation of law or court order. A good faith basis for raising a conflict of interest, or for investigating possible criminal conduct by the defense attorney, is not “interference” within the meaning of this Standard.

#### **STANDARD 1.5 CONTACTS WITH THE PUBLIC DURING THE INVESTIGATIVE PROCESS**

(a) The prosecutor should neither confirm nor deny the existence of an investigation, or reveal the status of the investigation, nor release information concerning the investigation, with the following exceptions:

(1) releasing information reasonably necessary to obtain public assistance in solving a crime, apprehending a suspect, or calming public fears;

(2) responding to a widely disseminated public call for an investigation by stating that the prosecutor will investigate, or decline to investigate the matter;

(3) responding to a law enforcement or regulatory matter of significant public safety concern, by stating that the prosecutor will begin an investigation or begin a special initiative to address the issue, or by

releasing information reasonably necessary to protect public safety, subject to restrictions in the law of the jurisdiction;

(4) announcing future investigative plans in order to deter criminal activity;

(5) stating in an already publicized matter and where justice so requires, that the prosecutor will not initiate, will not continue, or has concluded an investigation of a person, entity, or matter and, if applicable, has informed the subject or potential subject of the decision not to file charges;

(6) responding to widely disseminated false statements that the prosecutor is, or is not, investigating a person, entity, or matter;

(7) stating whether and when, if court rules so permit, an event open to the public is scheduled to occur;

(8) offering limited comment when public attention is generated by an event in the investigation (e.g., arrests, the execution of search warrants, the filing of charges, or convictions), subject to governing legal standards and court rules; and

(9) making reasonable and fair responses to comments of defense counsel or others.

(b) Except as a proper part of a court proceeding and in accordance with applicable rules, the prosecutor should not publicly make the following types of statements or publicly disclose the following information about an investigation:

(1) statements of belief about the guilt or innocence, character or reputation of subjects or targets of the investigation;

(2) statements that have a substantial likelihood of materially prejudicing a jury or jury panel;

(3) information about the character or reputation of a person or entity under investigation, a prospective witness, or victim;

(4) admissions, confessions, or the contents of a statement or alibi attributable to a person or entity under investigation;

(5) the performance or results of tests or the refusal or agreement of a suspect to take a test;

(6) statements concerning the credibility or anticipated testimony of prospective witnesses; and

(7) the possibility or likelihood of a plea of guilty or other disposition.

(c) The prosecutor should endeavor to dissuade police and other law enforcement agents and law enforcement personnel from making public information that the prosecutor would be prohibited from making public, or that may have an adverse impact on the investigation or any potential prosecution.

## **PART 2: STANDARDS FOR SPECIFIC INVESTIGATIVE FUNCTIONS OF THE PROSECUTOR**

### **STANDARD 2.1 THE DECISION TO INITIATE OR TO CONTINUE AN INVESTIGATION**

(a) The prosecutor should have wide discretion to select matters for investigation. Thus, unless required by statute or policy:

(1) the prosecutor should have no absolute duty to investigate any particular matter; and

(2) a particularized suspicion or predicate is not required prior to initiating a criminal investigation.

(b) In deciding whether an investigation would be in the public interest, the prosecutor should consider, but not necessarily be dissuaded by, the following:

(1) a lack of police interest;

(2) a lack of public or political support;

(3) a lack of identifiable victims;

(4) fear or reluctance by potential or actual witnesses; or

(5) unusually complex factual or legal issues.

(c) When deciding whether to initiate or continue an investigation, the prosecutor should consider:

(1) whether there is evidence of the existence of criminal conduct;

(2) the nature and seriousness of the problem or alleged offense, including the risk or degree of harm from ongoing criminal conduct;

(3) a history of prior violations of the same or similar laws and whether those violations have previously been addressed through law enforcement or other means;

(4) the motive, interest, bias or other improper factors that may influence those seeking to initiate or cause the initiation of a criminal investigation;

(5) the need for, and expected impact of, criminal enforcement to:

- (i) punish blameworthy behavior;
- (ii) provide specific and/or general deterrence;
- (iii) provide protection to the community;
- (iv) reinforce norms embodied in the criminal law;
- (v) prevent unauthorized private action to enforce the law;
- (vi) preserve the credibility of the criminal justice system; and
- (vii) other legitimate public interests.

(6) whether the costs and benefits of the investigation and of particular investigative tools and techniques are justified in consideration of, among other things, the nature of the criminal activity as well as the impact of conducting the investigation on other enforcement priorities and resources

(7) the collateral effects of the investigation on witnesses, subjects, targets and non-culpable third parties, including financial damage and harm to reputation

(8) the probability of obtaining sufficient evidence for a successful prosecution of the matter in question, including, if there is a trial, the probability of obtaining a conviction and having the conviction upheld upon appellate review; and

(9) whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.

(d) When deciding whether to initiate or continue an investigation, the prosecutor should not be influenced by:

(1) partisan or other improper political or personal considerations, or by the race, ethnicity, religion, gender, sexual orientation, political beliefs or affiliations, age, or social or economic status of the potential subject or victim, unless they are elements of the crime or are relevant to the motive of the perpetrator; or

(2) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor.

(e) The prosecutor's office should have an internal procedure to document the reason(s) for declining to pursue prosecution following a criminal investigation.

#### **STANDARD 2.2 SELECTIVE INVESTIGATIVE TECHNIQUES**

(a) The prosecutor should be familiar with routine investigative techniques and the best practices to be employed in using them.

(b) The prosecutor should consider the use of costlier, riskier, or more intrusive means of investigation only if routine investigative techniques would be inappropriate, ineffective, or dangerous, or if their use would impair the ability to take other desirable investigative steps. If non-routine techniques are used, the prosecutor should regularly reevaluate the need for them and whether the use of routine investigative techniques will suffice.

(c) The prosecutor should consider, in consultation with police and other law enforcement agents involved in the investigation, the following factors:

(1) the likely effectiveness of a particular technique;

(2) whether the investigative means and resources to be utilized are appropriate to the seriousness of the offense;

(3) the risk of physical danger to law enforcement officers and others;

(4) the costs involved with various investigative techniques and the impact such costs may have on other efforts within the prosecutor's office;

(5) the possibility of lost opportunity if an investigative technique is detected and reveals the investigation;

(6) means of avoiding unnecessary intrusions or invasions into personal privacy;

(7) the potential entrapment of otherwise innocent persons;

(8) the risk of property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;

(9) interference with privileged or confidential communication;

(10) interference with or intrusion upon constitutionally protected rights; and

(11) the risk of civil liability or other loss to the government.

(d) The prosecutor should consider the views of experienced police and other law enforcement agents about safety and technical and strategic considerations in the use of investigative techniques.

(e) The prosecutor may consider that the use of certain investigative techniques could cause the subject of the investigation to retain legal counsel and thereby limit the use of some otherwise permissible investigative techniques.

(f) The prosecutor should avoid being the sole interviewer of a witness, being alone with a witness, or otherwise becoming an essential witness to any aspect of the investigation.

(g) While the prosecutor may, and sometimes should, seek changes in law and policy, the prosecutor should abide by existing legal restraints, even if the prosecutor believes that they unjustifiably inhibit the effective investigation of criminal conduct.

### **STANDARD 2.3** USE OF UNDERCOVER LAW ENFORCEMENT AGENTS AND UNDERCOVER OPERATIONS

(a) For the purpose of these Standards, an "undercover law enforcement agent" is an employee of a government agency working under the direction and control of a government agency in a criminal investigation, whose true identity as a law enforcement agent involved in the investigation is concealed from third parties.

(b) For the purpose of these Standards, an "undercover operation" means an investigation in which undercover law enforcement agents or other persons working with law enforcement conceal their purpose of detecting crime or obtaining evidence to prosecute those engaged in illegal activities.

(c) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential benefits, including:

(1) the character and quality of evidence likely to be obtained; and

(2) the ability to prevent or solve crimes where obtaining reliable and admissible evidence to do so would otherwise be difficult or impossible to obtain.

(d) In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential risks, including:

(1) physical injury to law enforcement agents and others;

(2) lost opportunity if the operation is revealed;

(3) unnecessary intrusions or invasions into personal privacy;

(4) entrapment of otherwise innocent persons;

(5) property damage, financial loss to persons or businesses, damage to reputation or other harm to persons;

(6) interference with privileged or confidential communications;

(7) interference with or intrusion upon constitutionally protected rights;

(8) civil liability or other adverse impact on the government;

(9) personal liability of the law enforcement agents;

(10) involvement in illegal conduct by undercover law enforcement agents or government participation in activity that would be considered unsuitable and highly offensive to public values and that may adversely impact a jury's view of a case; and

(11) the possibility that the undercover operation will unintentionally cause an increase in criminal activity.

(e) The prosecutor advising an undercover investigation should:



(1) consult with appropriate police or law enforcement agents on a basis about the continued propriety of the operation and the legal sufficiency and quality of the evidence that is being produced by the operation;

(2) seek periodic internal review of the investigation to determine whether the operation's benefits continue to outweigh its risks and costs, including the extent to which:

- (i) the goals of the investigation have been accomplished;
- (ii) there is potential for the acquisition of additional useful and non-duplicative information;
- (iii) the investigation can continue without exposing the undercover operation; and
- (iv) continuation of the investigation may cause financial or other injury to innocent parties.

(f) The prosecutor should seek to avoid or minimize the risks involved in the active participation of undercover police or law enforcement agents in illegal activity, and provide such agents guidance about authorized participation in otherwise criminal conduct.

(g) Records of funds expended and generated by undercover activity should be retained and accounted for in a manner that facilitates a comprehensive and accurate audit.

#### **STANDARD 2.4 USE OF CONFIDENTIAL INFORMANTS**

(a) As used in these Standards, a "confidential informant" is a person who supplies information to police or law enforcement agents pursuant to an agreement that the police or investigative agency will seek not to disclose the person's identity. The identity of a confidential informant may also be unknown to the prosecutor. A confidential informant may in some instances become a cooperator, and in such circumstances reference should be made to Standard 2.5.

(b) The prosecutor should consider possible benefits from the use of a confidential informant, including whether the confidential informant might enable the government to obtain:

- (1) first-hand, eyewitness accounts of criminal activity;

(2) critical background information about the criminal activity or criminal organization under investigation;

(3) information necessary to provide a basis for additional investigative techniques or court-ordered means of investigation such as a search warrant; and

(4) identification of witnesses or leads to witnesses who can provide direction to further the investigation or valuable testimony to a grand jury or at trial.

(c) The prosecutor should consider possible risks from the use of a confidential informant. These include risks that the confidential informant will:

(1) be untruthful, or provide misleading or incomplete information;

(2) compromise the criminal investigation by revealing information to others, including the subjects or targets of the investigation;

(3) engage in behavior constituting entrapment;

(4) commit or continue to commit crimes;

(5) be subject, or subject others, to serious risk of physical harm as a result of cooperating with law enforcement; and

(6) interfere with privileged or confidential relationships or communications or violate the rights of the investigation's subject .

(d) The prosecutor should avoid being alone with a confidential informant, even for a brief period of time.

(e) Before deciding to rely upon the information provided by a confidential informant for significant investigative steps, the prosecutor should review the following with the police or law enforcement agents:

(1) the ability of the confidential informant to provide or obtain information relevant to the criminal investigation;

(2) means of corroborating information received from the confidential informant;

(3) the possible motives or biases of the confidential informant, including the motive to gain a competitive advantage over others in either criminal or legitimate enterprises;

(4) the nature of any and all promises made to the prospective confidential informant by other prosecutors, police or law enforcement agents, including promises related to the treatment of associates or relatives of the confidential informant;

(5) the prior history of the confidential informant, including prior criminal activity and other information, including the informant's true identity if necessary for the prosecutor's review;

(6) whether the prospective confidential informant is represented by an attorney or is party to a joint defense agreement with other targets of the investigation and, if so, how best to address potential legal or ethical issues related to the representation or agreement;

(7) if reasonably available, the experience other prosecutors and law enforcement agents have had with the confidential informant;

(8) whether the proposed compensation or benefits to be received by the confidential informant are reasonable under the circumstances;

(9) the risk that the prospective confidential informant may be an agent of the subjects of the investigation or of other criminal groups and individuals, or may reveal investigative information to them; and

(10) the risk that the prospective confidential informant will engage in criminal activity not authorized by the prosecutor, and the seriousness of that unauthorized criminal activity.

(f) The prosecutor's office should work with police and law enforcement agents to develop best practices and policies for the use of confidential informants that include:

(1) a rule that investigative information obtained from other sources should not be provided to the confidential informant unless doing so would materially advance the investigation;

(2) prohibitions on making promises of compensation or other benefits that would shock the conscience of a moral society or would risk compromising the credibility of the informant in any proceeding in which the informant's testimony may be important;

(3) prohibitions on making promises that the police or law enforcement agents are unlikely to be able to keep;

(4) routine instructions to confidential informants to refrain from criminal conduct other than as directed by law enforcement; and

(5) the routine use of standard form agreements when such agreements are entered into by law enforcement officers without the involvement of the prosecutor.

**STANDARD 2.5 COOPERATION AGREEMENTS AND COOPERATING INDIVIDUALS AND ORGANIZATIONAL WITNESSES**

(a) As used in these Standards, “cooperation agreements” are agreements between the prosecutor and otherwise culpable individuals or entities (“cooperators”) who provide the government with assistance useful to an investigation in exchange for benefits. A cooperator may have been a confidential informant earlier in the investigation.

(b) The prosecutor should ordinarily seek to have the cooperator plead guilty to an appropriate criminal charge rather than provide the cooperator immunity for culpable conduct.

(c) In deciding whether to offer a cooperator significant benefits, including a limit on criminal liability, immunity, or a recommendation for reduction of sentence, the prosecutor should consider whether:

(1) the cooperator is able and willing to provide valuable assistance to the investigation;

(2) the cooperator will maintain the confidentiality or secrecy of the investigation;

(3) the cooperator has biases or personal motives that might result in false, incomplete, or misleading information;

(4) leniency or immunity for the criminal activity of the cooperator is warranted by the goals of the investigation and the public interest, including appropriate consideration for victim(s) interests;

(5) providing leniency, immunity or other benefits would be seen as offensive by the public or cause a reasonable juror to doubt the veracity of the cooperator’s testimony;

(6) information that has been provided (such as through an attorney proffer or by a debriefing of the cooperator) has been corroborated or can otherwise shown to be accurate;

(7) the culpability of other participants in the criminal activity relative to the cooperator's culpability has been determined as accurately as possible;

(8) there is a likelihood that the cooperator will provide useful information only if given leniency or immunity;

(9) the case could be successfully prosecuted without the cooperator's assistance; and

(10) the cooperator could be successfully prosecuted without the admissions of the cooperator made pursuant to the agreement.

(d) The cooperation agreement should not:

(1) promise to forego prosecution for future criminal activity, except where such activity is necessary as part of an officially supervised investigative and enforcement program; or

(2) adversely affect third parties' legal rights.

(e) The prosecutor should:

(1) be aware that anything said to the cooperator might be repeated to the cooperator's criminal associates or in open court; and

(2) be aware of the disclosure requirements under relevant law if a cooperator ultimately testifies at trial, including disclosure of any and all agreements and promises made to the cooperator and evidence which could impact the cooperator's credibility, including the complete criminal history of the cooperator. The prosecutor should take steps to assure the preservation of such evidence.

(f) The prosecutor should recognize and respect the role of the cooperator's attorney in the decision to cooperate and in the disposition of significant legal rights.

(g) Ordinarily, a prosecutor who offers leniency in exchange for cooperation should not withdraw or threaten to withdraw the offer because of the potential cooperator's request to consult with counsel prior to deciding whether to accept it. However, if the time required for the potential cooperator to consult with counsel would render the agreement ineffective, the prosecutor may withdraw or threaten to withdraw the offer before there is opportunity for such consultation. In

that event, the prosecutor may condition cooperation on an immediate and uncounseled decision to proceed.

(h) The prosecutor should reduce a cooperation agreement to writing as soon as practicable. An agreement should only cover those crimes known to the government at the time it is made, and should specify:

(1) the specific details of all benefits and obligations agreed upon;

(2) the specific activities to be performed by the cooperator;

(3) the requirement that the cooperator be truthful in dealing with the government and in all legal proceedings;

(4) the prohibition against the cooperator's engaging in any criminal conduct other than as directed by law enforcement;

(5) the extent of the disposition of the potential criminal and civil claims against the cooperator;

(6) a complete list of any other promises, financial benefits or understandings;

(7) the limitations of the agreement with respect to the terms it contains and to the identified jurisdiction or jurisdictions; and

(8) the remedy in the event the cooperator breaches the agreement.

(i) The prosecutor should avoid being alone with a cooperator even for a brief period of time.

(j) The prosecutor should guard against the cooperator obtaining information from others that invades the attorney-client or work product privileges or violates the Sixth Amendment right to counsel.

(k) Prior to relying on the cooperator's information in undertaking an investigative step that could cause adverse consequences to the investigation or to a third party, the prosecutor should be satisfied as to the truthfulness of the cooperator.

(l) If an investigative step involves an application to a court or other official body, the prosecutor should make appropriate and required disclosures about the cooperator to the court or other body.

(m) If the prosecutor suspects that the cooperator is not being truthful, the prosecutor should take reasonable steps to address such concerns and seek further corroboration of the cooperator's information.

(n) If the prosecutor determines that a cooperator has knowingly provided false information or otherwise breached the cooperation agreement, the prosecutor should:

- (1) seek guidance from a supervisor;
- (2) undertake or request the initiation of an investigation into the circumstances;
- (3) consider the possible prosecution of the cooperator, and;
- (4) carefully reevaluate the investigation.

**STANDARD 2.6 THE DECISION TO ARREST DURING A CONTINUING CRIMINAL INVESTIGATION**

(a) In making a tactical decision whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential benefits of the arrest, including:

- (1) protecting the public from a person known to present an imminent danger;
- (2) reducing the likelihood of flight;
- (3) preventing the destruction of evidence and providing an opportunity to obtain evidence of a crime pursuant to a search incident to arrest;
- (4) stopping or deterring the harassment or coercion of witnesses or other acts of obstruction of justice;
- (5) creating an opportunity to ask questions about an unrelated crime;
- (6) encouraging other culpable individuals or witnesses to surrender to law enforcement and to cooperate with the investigation;
- (7) inducing relevant conversation or other communication likely to be intercepted by law enforcement; and

(8) protecting the existence of an undercover agent or confidential informant, a cooperator or an undercover operation.

(b) In deciding whether, when or where to arrest a subject during a continuing investigation, the prosecutor should consider the potential risks of the arrest, including:

(1) limiting the continued conduct of a criminal investigation by alerting others involved in continuing criminal activity;

(2) restricting the use of some investigative techniques;

(3) triggering speedy charge and speedy trial rules;

(4) triggering disclosure obligations that have been subject to delayed notice;

(5) appearing to be illegitimate or pre-textual and thus adversely affecting community support for police and prosecution efforts; and

(6) causing significant shame, embarrassment or prejudice to the arrestee or innocent third parties and unintended and unfair financial impacts.

(c) The prosecutor should be aware that Sixth Amendment right to counsel issues raised by the filing of criminal charges may limit the availability of some investigative options, including:

(1) use of the grand jury as an investigative technique;

(2) soliciting incriminating information from a charged individual;  
and

(3) contacts with the individuals or entities who have been charged.

#### **STANDARD 2.7 USE OF SUBPOENAS**

(a) As used in these Standards, a “subpoena,” however named or designated, is a written command for a person or entity to provide physical evidence, testimony or documents. A subpoena may be issued by a prosecutor, a court, a grand jury or a law enforcement agency, as provided by the law of the jurisdiction.



(b) In deciding whether to use a subpoena, the prosecutor should consider potential benefits including:

(1) the conservation of law enforcement resources by requiring others to search for and provide factual information and physical evidence needed for an investigation;

(2) the imposition of an obligation on the subject of the subpoena to provide factual information or physical evidence;

(3) the fact that no predicate or less of a showing is required to issue a subpoena, as compared to a search warrant;

(4) the ability to delay or prevent a third party from voluntarily or compulsorily disclosing information about the subpoena (including the disclosure of either the fact of the subpoena itself or of any information provided in response) as a means to preserve the secrecy of the investigation if authorized by law; and

(5) voluntary disclosures or cooperation by witnesses and subjects prompted by receipt of the subpoena.

(c) In deciding whether to use a subpoena, the prosecutor should consider the following potential risks and ways to mitigate them:

(1) that evidence will be destroyed or altered in between receipt and production;

(2) that information responsive to the subpoena will be improperly withheld or that the request will be interpreted narrowly; and

(3) that knowledge of the subpoena will cause the subjects of the investigation to disguise criminal activity, or take actions to impede or obstruct the investigation.

(d) The prosecutor using a subpoena should:

(1) seek to limit the scope of the subpoena to the needs of the investigation, avoid overbroad requests, and avoid seeking the production of attorney-client privileged material; and

(2) provide reasonable accommodations based on factors such as the size or nature of the request, the impact of the request on legitimate business operations, or the time reasonably needed to perform a review for

privileged or other legally protected fact information, unless doing so would be outweighed by the government's interest in avoiding delay.

(e) The prosecutor should ensure that materials received pursuant to a subpoena are properly stored, logged or indexed, and are readily retrievable.

(f) The prosecutor should accept copies of documents subject to a subpoena unless there is a specific need for original documents that outweighs the producing party's need and right to retain its original materials.

(g) The prosecutor should provide copies, or if necessary, reasonable access to copies or original documents to the person or entity who has produced the copies or originals.

(h) The prosecutor should seek to minimize the cost and dislocation suffered by a person or entity to whom a subpoena is issued and, where applicable, should inform the person or entity of any right to compensation allowed by law.

(i) The prosecutor should arrange for the return of subpoenaed documents and materials when the purpose for which they were subpoenaed has ended.

(j) The prosecutor involved in an investigation where police or law enforcement agents have legal authority to issue written requests for various records and data without probable cause or judicial oversight, should provide advice as to whether the proposed use of such authority is consistent with the limits of the applicable law, the Constitution, and the circumstances of the investigation.

## **STANDARD 2.8 SEARCH WARRANTS**

(a) As used in these Standards a "search warrant" is a written command issued by a judge or magistrate that permits law enforcement agents to search specified persons or premises and seize specified effects and information.

(b) The prosecutor should consider the following potential benefits associated with using a search warrant:

(1) securing evidence that might otherwise be removed, hidden, altered or destroyed;

(2) removing contraband from commerce before it is transferred or used;

(3) seeing and documenting the precise location of the items to be seized in their natural or unaltered state or location;

(4) obtaining statements by individuals at the scene of the search that might further the investigation;

(5) observing and recording the presence of individuals found together at the scene of the search as evidence of their coordination; and

(6) encouraging other culpable individuals or witnesses to come forward and provide information to the investigation.

(c) The prosecutor should consider the following potential costs and risks before applying for a search warrant:

(1) the extensive utilization of limited government resources during the preparation and execution of a search warrant, as compared with other means of gathering information, such as a subpoena;

(2) the intrusive nature of the execution of the warrant and its impact on personal privacy or on legitimate business operations;

(3) the impact of execution of the warrant on innocent third parties who may be on the premises at the time the warrant is executed; and

(4) the potential danger or harm to third parties.

(d) When the prosecutor is involved in an investigation, the prosecutor should review search warrant applications prior to their submission to a judicial officer. In all other cases, the prosecutor should encourage police and law enforcement agents to seek prosecutorial review and approval of search warrants prior to their submission to a judicial officer.

(e) In jurisdictions that authorize telephonic warrants, the prosecutor should be familiar with the rules governing the use of such warrants and should be available to confer with law enforcement agents about them.

(f) In reviewing a search warrant application, the prosecutor should:

(1) seek to assure the affidavit is complete, accurate and legally sufficient;

(2) seek to determine the veracity of the affiant and the accuracy of the information, especially when the application is based on information from a confidential informant; and

(3) seek to ensure that the affidavit is not misleading and does not omit material information which has a significant bearing on probable cause.

(g) The prosecutor involved in the investigation should:

(1) generally, if time permits, meet in advance with all law enforcement and other personnel who will participate in the execution of the warrant to explain the scope of the warrant, including the area(s) to be searched and the items to be seized;

(2) consistent with the goals of the investigation, provide legitimate business operations and third parties reasonable access to seized records;

(3) avoid becoming a necessary percipient witness at the scene of the execution of the warrant but be readily available and accessible to respond to immediate questions or to assist in the preparation of additional warrant applications;

(4) seek to ensure that an inventory is filed as required by relevant rules; and

(5) seek to preserve exculpatory evidence obtained during a search and consider the impact of such evidence on the criminal investigation.

(h) When searching an attorney's office, or any place where attorney-client or other privileged material is likely to be located or is discovered, the prosecutor should arrange for evidence to be recovered in such manner as to prevent or minimize any unauthorized intrusion into confidential relationships or information privileged under law.

(i) The prosecutor should seek to prevent or minimize the disclosure of information to the public which a person or entity may consider private or proprietary.

(j) The prosecutor should consider seeking to delay notice about the execution of a search warrant if such delay is authorized by law and if prompt disclosure of the execution of the warrant could reasonably be expected to result in:

(1) the endangerment of life or physical safety of an individual;

(2) the intimidation of potential witnesses;

- (3) the flight from prosecution by a target of any investigation;
- (4) the destruction of or tampering with evidence in any investigation; or
- (5) any other serious jeopardy to an investigation.

(k) The prosecutor should not notify media representatives of a search before it occurs and should advise law enforcement agents acting with the prosecutor in the investigation not to do so.

(l) The prosecutor should consider whether the papers supporting the search warrant should be sealed after the warrant is executed and should make application to do so only when the prosecutor believes that the public's interest in knowing of the warrant is outweighed by the need to maintain secrecy of the investigation or to prevent unfair publicity to the persons or organizations whose premises were searched.

#### **STANDARD 2.9 USE OF THE INVESTIGATIVE POWERS OF THE GRAND JURY**

(a) In deciding whether to use a grand jury, the prosecutor should consider the potential benefits of the power of the grand jury to compel testimony or elicit other evidence by:

- (1) conferring immunity upon witnesses;
- (2) obtaining evidence in a confidential forum;
- (3) obtaining evidence from a witness who elects not to speak voluntarily to the police or prosecutor;
- (4) obtaining documentary or testimonial evidence with the added reliability provided by the oath and the secrecy requirements of the grand jury;
- (5) obtaining documentary evidence from a third party that may be difficult to obtain from a target; and
- (6) preserving witnesses' accounts in the form of sworn testimony where the jurisdiction provides for recording or transcription of the proceedings.

(b) In deciding whether to use a grand jury, the prosecutor should consider the potential risks including:

- (1) revealing the existence or direction of an investigation;
  - (2) obtaining evasive or untruthful testimony from witnesses who are loyal to targets or fearful of them;
  - (3) relying on witnesses to obey the commands of subpoenas directing them to produce documents or physical evidence;
  - (4) granting immunity to witnesses:
    - (i) who are not believed culpable at the time of the grant but are later found to be culpable; or
    - (ii) who are later found to be more culpable than the prosecutor believed at the time of the grant;
  - (5) exposing grand jury witnesses to reputational, economic or physical reprisal; and
  - (6) exposing grand jury witnesses to collateral consequences such as lost time from employment or family obligations, financial costs of compliance, and potential damage to their reputation from association with a criminal investigation.
- (c) In pursuing an investigation through the grand jury, the prosecutor should:
- (1) only bring a matter before the grand jury with the primary purpose of seeking justice and to be mindful of the ex parte nature of proceedings;
  - (2) prepare adequately before conducting grand jury examinations;
  - (3) know and follow the laws of the jurisdiction and the rules, practices, and policies of the prosecutor's office;
  - (4) pose only legal and proper questions and, if within the knowledge of the prosecutor questioning may elicit a privileged or self-incriminating response, advise the witness of the existence of the applicable privilege; and
  - (5) unless prohibited by the law of the jurisdiction, ensure that grand jury proceedings are recorded.
- (d) The prosecutor should use grand jury processes fairly and should:

(1) treat grand jurors with courtesy and give them the opportunity to have appropriate questions answered; however, the prosecutor should not allow questions that:

(i) elicit facts about the investigation that should not become known to the witness; or

(ii) call for privileged, prejudicial, misleading or irrelevant evidence;

(2) issue a subpoena ad testificandum only if the prosecutor intends to bring the witness before the grand jury;

(3) refrain from issuing a subpoena that is excessively broad or immaterial to the legitimate scope of the grand jury's inquiry;

(4) make reasonable efforts before a witness appears at the grand jury to determine that the testimony is needed, including offering the witness or witness' counsel a voluntary pre-appearance conference;

(5) grant reasonable requests for extensions of dates for appearance and production of documents when doing so does not impede the grand jury's investigation; and

(6) resist dilatory tactics by witnesses that undermine the grand jury's investigation, authority, or credibility.

(e) The prosecutor should examine witnesses with courtesy and in a manner designed to elicit truthful testimony, and should:

(1) consider warning a witness suspected of perjury of the obligations to tell the truth;

(2) insist upon definite answers that will:

(i) fully inform the members of grand jury; and

(ii) establish a clear record so that a witness committing perjury or contempt can be held responsible for such actions;

(3) inform grand jury witnesses of their right to consult with their attorneys to the extent provided by the policy, procedure or law of the jurisdiction; and

(4) seek a compulsion order only when the testimony sought is in the public interest, there is no other reasonable way to elicit such testimony, and the witness has refused to testify or has indicated an intent to invoke the privilege against self-incrimination.

(f) In determining whether obtaining testimony from a culpable witness will outweigh the cost of granting immunity, a prosecutor should consider the following factors:

(1) the relative culpability of the witness to be immunized as compared with the person against whom the testimony will be offered;

(2) the gravity of the crime(s) being investigated;

(3) the probability that the testimony would advance the investigation or an eventual prosecution;

(4) the gravity of the crime(s) for which the witness would be granted immunity;

(5) the character and history of the witness being considered for immunity, including how these factors might affect the witness's credibility;

(6) the scope of the immunity that the witness would receive;

(7) the risk that the immunized witness would lie or feign lack of memory;

(8) the risk that the immunized witness would falsely claim responsibility for criminal acts committed by another; and

(9) the potential for the grand jury testimony to enhance truthful testimony by hostile or reluctant witnesses at trial or provide evidence to prove perjury if a witness lies at trial.

(g) Ordinarily, the prosecutor should not seek to compel testimony from a close relative of a target of an investigation by threatening prosecution or offering immunity, unless:

(1) the relative participated criminally in an offense or criminal enterprise with the target and the testimony sought would relate to that enterprise's activities;



(2) the testimony sought relates to a crime involving overriding prosecutorial concerns; or

(3) comparable testimony is not readily available from other sources

(h) Ordinarily, the prosecutor should give notice to a target of a grand jury investigation and offer the opportunity for the target to testify without immunity before the grand jury. However, notice need not be provided if there is a reasonable possibility it will result in flight of the target, endanger other persons, or obstruct justice. Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a waiver of that right.

(i) A prosecutor with personal knowledge of non-frivolous evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. If evidence is provided to the prosecutor by the subject or target of the investigation and the prosecutor decides not to provide the evidence to the grand jury, the prosecutor should notify the subject, target or their counsel of that decision without delay, so long as doing so would not jeopardize the investigation or prosecution or endanger others.

#### **STANDARD 2.10 TECHNOLOGICALLY-ASSISTED PHYSICAL SURVEILLANCE**

(a) As used in these Standards, "technologically-assisted physical surveillance" includes: video surveillance, tracking devices, illumination devices, telescopic devices, and detection devices.

(b) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the potential benefits, including:

(1) detecting the criminal possession of objects that are dangerous or difficult to locate; and

(2) seeing or tracing criminal activity by means that are minimally intrusive and limiting the risks posed to the public and law enforcement personnel.

(c) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal and privacy implications for subjects, victims and third parties. The prosecutor should seek to use such surveillance techniques in proportion to the seriousness of the criminal activity being investigated and the needs of the particular investigation and in a manner designed to be minimally intrusive.

(d) In deciding whether to use technologically-assisted physical surveillance, the prosecutor should consider the legal requirements applicable to the technique under consideration, and whether those requirements have been met.

**STANDARD 2.11** CONSENSUAL INTERCEPTION, TRANSMISSION AND  
RECORDING OF COMMUNICATIONS

(a) As used in these Standards “consensual interception” is an electronic, digital, audio or video interception and recording of communications to which one or more but not all participants in the communications has consented.

(b) In deciding whether to use consensual interception, the prosecutor should consider the potential benefits, including obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.

(c) In deciding whether to use consensual interception, the prosecutor should consider the potential risks, including:

(1) problems of audibility and admissibility;

(2) the danger of detection, including physical risk to those participating, and the risk of disclosure of the investigation;

(3) selective recording of communications by the cooperating party;

(4) the danger of obtaining false, misleading or self-serving statements by a party to the conversation who is aware or suspects that the conversation is being recorded;

(5) the risk that the consenting individual will conspire with the subject of the investigation to create false or misleading statements; and

(6) the risk that the import of a conversation will be distorted by the cooperating party.

(d) To maximize the benefits and to minimize the risks of using consensual interception, the prosecutor should:

(1) obtain written or recorded consent from the consenting individual; and

(2) minimize to the extent practicable recording outside the presence of law enforcement agents and, if such a recording occurs or will occur:

(i) have law enforcement agents test and activate the recording equipment before the cooperating party meets with the subject; and

(ii) minimize the necessity for the cooperating party to operate the recording equipment and, if it is necessary for the cooperating party to operate the equipment, provide that individual specific directions on how to operate the equipment and strict instruction to be present with it during such operation.

(e) The prosecutor, in consultation with the law enforcement agents, should regularly review all or selected recordings obtained during consensual interceptions.

(f) The prosecutor should take steps to ensure law enforcement agents comply with procedures relating to the acquisition of, custody of, and access to electronic equipment and recording media and to the secure preservation of any recordings produced whether they are obtained by consenting individuals or by law enforcement agents.

#### **STANDARD 2.12 NON-CONSENSUAL ELECTRONIC SURVEILLANCE**

(a) As used in these Standards "non-consensual electronic surveillance" is the court-ordered interception of communications, actions, or events.

(b) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential benefit of obtaining direct, incriminating, and credible evidence that can be used alone or to corroborate other information.

(c) In deciding whether to request a court order for non-consensual electronic surveillance, the prosecutor should consider the potential costs and risks, including:

(1) whether the suspected criminal activity being investigated is sufficiently serious and persistent to justify:

(i) the significant intrusion on the privacy interests of targets and innocent third parties;

(ii) the need to obtain periodic reauthorization for electronic surveillance; and

(iii) the financial and resource costs associated with such surveillance.

(2) whether all requirements of the law are met.

(d) The prosecutor, including an applicant, should be aware of the reporting requirements under federal and state law and heightened obligations and accountability to the court in connection with the application and use of non-consensual electronic surveillance.

(e) Prior to the initiation of non-consensual electronic surveillance, the prosecutor should review the following with the law enforcement agents and contract personnel such as interpreters who will assist in the execution of the order:

(1) the scope of the order;

(2) obligations of the monitoring law enforcement agents and monitoring personnel to minimize the interception of privileged conversations and other conversations outside the scope of the order and to alert the prosecutor promptly when recording evidence of new crimes;

(3) the prohibition on listening without recording;

(4) rules related to protecting the integrity and chain of custody of recordings;

(5) instructions to contact the prosecutor whenever a noteworthy event occurs, or there is a question regarding the execution of the order; and

(6) the need to adhere to non-disclosure requirements.

(f) The prosecutor should stay informed of actions of law enforcement agents and contract personnel throughout the use of non-consensual electronic surveillance and should take appropriate steps to determine whether the required procedures are being followed by those carrying out the surveillance.

#### **STANDARD 2.13 CONDUCTING PARALLEL CIVIL AND CRIMINAL INVESTIGATIONS**

(a) In deciding whether to conduct a criminal investigation and throughout any such investigation that is undertaken, the prosecutor should consider whether society's interest in the matter might be better or equally vindicated by available civil, regulatory, administrative, or private remedies.

(b) When doing so would not compromise a proper prosecutorial interest, and to the degree permitted by law, the prosecutor should cooperate with other governmental authorities regarding their investigations for the purpose of instituting remedial actions that are of legitimate concern to such entities. In the course of such cooperation, the prosecutor:

(1) should retain sole control of the criminal investigation and maintain independent judgment at all times;

(2) should be aware of rules that prohibit or restrict the sharing or disclosure of information or material gathered through certain criminal investigative techniques;

(3) should not be a party to nor allow the continuation of efforts by civil investigative agencies or attorneys to use the criminal process for the purpose of obtaining a civil settlement; and

(4) may, in order to preserve the integrity of a criminal investigation or prosecution, ask a civil investigative agency to refrain from taking an investigative step or bringing an action but, in considering whether to do so, should consider the detriment to the public that may result from such forbearance.

(c) A prosecutor should consider the appropriateness of non-criminal or global (civil and criminal resolutions) dispositions suggested by subjects or targets, whether or not they choose to cooperate, and may consider proposals by them to include civil or regulatory sanctions as part of a disposition or cooperation agreement.

**STANDARD 2.14** TERMINATING THE INVESTIGATION, RETENTION OF EVIDENCE  
AND POST-INVESTIGATION ANALYSIS

(a) The prosecutor should diligently pursue the timely conclusion of criminal investigations.

(b) The prosecutor's office should periodically review matters under investigation in the office and determine whether the interests of justice would be served by terminating the investigation.

(c) The prosecutor should determine whether information obtained in investigations should be made available for civil enforcement purposes, administrative remedies, or for other purposes consistent with law and the public interest.

(d) To the extent feasible, the prosecutor and members of the investigative agencies should analyze investigations retrospectively, to evaluate techniques and steps that worked well or that proved to be deficient.

(e) Post-investigation analysis by the prosecutor's office should include seeking to identify ways other than prosecution to prevent, minimize or deter similar crimes from occurring in the future.

(f) Prosecutors should be aware of the requirements and office practices regarding the preservation of investigative records and of their compliance obligations with regard to information access and privacy law provisions.

(g) To the extent practicable, the prosecutor should, upon request, provide notice of termination of the investigation to subjects who became aware of the investigation.

(h) Upon termination of the investigation and related proceedings, physical evidence other than contraband should be returned promptly to the person from whom it was obtained, absent an agreement, court order or requirement of law to the contrary.

#### **STANDARD 2.15 GUIDANCE AND TRAINING FOR LINE PROSECUTORS**

(a) A prosecutor's office should be organized in a manner to provide line prosecutors guidance consistent with these Standards.

(b) To guide the exercise of discretion, a prosecutor's office should:

(1) encourage consultation and collaboration among prosecutors;

(2) appoint supervisors with appropriate experience, strong skills and a commitment to justice and ethical behavior;

(3) require consultation and approval at appropriate supervisory levels for investigative methods of different levels of intrusiveness, risk and costs;

(4) provide regular supervisory review throughout the course of investigations;

(5) regularly review investigative techniques and promote best practices to reflect changes in law and policy;

(6) create and implement internal policies, procedures, and standard practices that teach and reinforce standards of excellence in performance, professionalism, and ethics;

(7) create and implement policies and procedures that protect against practices that could result in unfair hardships, the pursuit of baseless investigations, and the bringing of charges against the innocent;

(8) develop and support practices designed to prevent and to rectify conviction of the innocent.

(9) determine what types of investigative steps require formal supervisory approval, and at what supervisory level, and

(10) require line attorneys to consult with supervisors or experienced colleagues when making significant investigative decisions absent exigent circumstances.

(c) A prosecutor's office should provide guidance and training by:

(1) strongly encouraging consultation and collaboration among line assistants;

(2) appointing supervisors with appropriate experience and strong commitments to justice, and fostering close working relationships between supervisors and those they supervise;

(3) providing formal training programs on investigative techniques and the ethical choices implicated in using them; and

(4) creating internal policies and standard practices regarding investigations that memorialize and reinforce standards of excellence, professionalism, and ethics. In doing so:

(i) policy and practice materials should be regularly reviewed and updated and should allow flexibility for the exercise of prosecutorial discretion, and

(ii) written policies and procedures should not be a substitute for regular training for all office members and a commitment to mentoring less-experienced attorneys.

(d) When a line prosecutor believes the needs of an investigation or some extraordinary circumstance require actions that are contrary to or outside of

existing policies, the prosecutor should seek prior approval before taking such actions.

(e) A prosecutor's office should develop policies and procedures that address the initiation and implementation of the investigative tools discussed in these Standards in advance of the specific needs of an investigation.

**STANDARD 2.16 SPECIAL PROSECUTORS, INDEPENDENT COUNSEL AND SPECIAL PROSECUTION UNITS**

(a) As used in these Standards, a "special prosecutor" or an "independent counsel" is a prosecutor serving independently from the general prosecution office under a particularized appointment and whose service in that role typically ends after the purpose of the appointment is completed. A "special prosecution unit" is typically a unit that focuses on a particular type of crime, criminal activity, or victim.

(b) Although the special prosecutor and the special prosecution unit are removed from the responsibilities of a general prosecution office, a prosecutor in this role should:

(1) be bound by the same policies and procedures as regular prosecutors in their jurisdiction, unless to do so would be incompatible with their duties;

(2) base judgments about the merits of pursuing a particular investigation upon the same factors that should guide a regular prosecutor, including the seriousness of the offense, the harm to the public, and the expenditure of public resources; and

(3) in choosing matters to investigate, consider the danger that the narrow focus or limited jurisdiction of the prosecutor or the unit will lead to the pursuit of what would, in a general prosecution office, be considered an insubstantial violation, or one more appropriately resolved by civil or administrative actions.

**STANDARD 2.17 USE OF INFORMATION, MONEY, OR RESOURCES PROVIDED BY NON-GOVERNMENTAL SOURCES**

(a) The prosecutor may use information provided by non-governmental sources that is pertinent to a potential or existing criminal investigation. However, consistent with the principles in Standard 2.1, the prosecutor should make an independent evaluation of the information and make an independent decision as to whether to allocate or continue to allocate resources to investigating the matter.



(b) If the law of the jurisdiction permits the acceptance of financial or resource assistance from non-governmental sources, the decision to accept such assistance should be made with caution by the chief public prosecutor or an accountable designee after careful consideration of:

- (1) the extent to which the law of the jurisdiction permits the acceptance of financial or resource assistance;
- (2) the extent to which the offer is in the public interest, as opposed to an effort to achieve the limited private interests of the non-governmental sources;
- (3) the extent to which acceptance may result in foregoing other cases;
- (4) the potential adverse impact on the equal administration of the criminal law;
- (5) the extent to which the character and magnitude of the assistance might unduly influence the prosecutor's subsequent exercise of investigative and prosecutorial discretion;
- (6) the likelihood that the community may view accepting the assistance as inconsistent with the fair and equal administration of criminal justice;
  - (i) the likelihood that accepting assistance from private sources may create an appearance of undue influence over law enforcement; and
- (7) the extent to which financial or resource assistance would enhance or enable the investigation of criminal activity;

(c) The prosecutor should consider the risk that encouraging information gathering from non-governmental sources may lead to abusive, dangerous or even criminal actions by private parties.

(d) The office of the prosecutor should have procedures designed to protect the independent exercise of investigative discretion from being influenced by the receipt of outside financial or resource assistance, including careful accounting and recordkeeping of the amounts and terms of such assistance and clear disclosure that providing assistance will not guide the exercise of investigative or prosecutorial discretion.

(e) The prosecutor, consistent with the law of the jurisdiction, should disclose significant non-governmental assistance to relevant legislative or public bodies having oversight over the prosecutor's office and, when appropriate, the public.

(f) Non-governmental assistance should be disclosed to affected parties as part of the discovery process.

**STANDARD 2.18** USE OF SENSITIVE, CLASSIFIED OR OTHER INFORMATION  
IMPLICATING INVESTIGATIVE PRIVILEGES

(a) The prosecutor should be alert to the need to balance the government's legitimate interests in protecting certain information from disclosure, and the legitimate interests and Constitutional rights of the public and of defendants favoring disclosure.

(b) When appropriate, the prosecutor should request court orders designed to protect the disclosure of law enforcement means and methods, informant identities, observation posts, and such other information that might jeopardize future investigations or the safety or reputation of persons directly or indirectly involved in an investigation.

(c) In investigations believed to have the potential to include classified or sensitive information, prosecutors should seek to obtain the relevant information and consult laws, regulations and other requirements for handling such information before making any charging decisions.

**PART 3: PROSECUTOR'S ROLE IN RESOLVING INVESTIGATION PROBLEMS**

**STANDARD 3.1** PROSECUTOR'S ROLE IN ADDRESSING LAW ENFORCEMENT  
MISCONDUCT

(a) If the prosecutor has reason to suspect misconduct or unauthorized illegal activity at any level of the prosecutor's office or in any agency or department engaged in a criminal investigation, the prosecutor should promptly report the suspicion and the reason for it to appropriate supervisory personnel in the prosecutor's office who have authority to address the problem, or to the appropriate inspector general's office, or similar agency, if reporting within the prosecutor's own office is problematic. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.

(b) If the prosecutor has reason to believe that a criminal investigation or prosecution is, or is likely to be, adversely affected by incompetence, lack of

skilled personnel or inadequate resources in the prosecutor's office or in any other relevant agency or department, the prosecutor should promptly report that belief and the reason for it to supervisory personnel in the prosecutor's office.

(c) A supervisory prosecutor who receives an allegation of misconduct, unauthorized illegal conduct, or who receives an allegation of incompetence, inadequate resources, or lack of skilled personnel that is, or is likely to, adversely affect a criminal investigation, should undertake a prompt and objective review of the facts and circumstances or refer the matter to an appropriate agency or component responsible for addressing such allegations. When practicable, the line prosecutor making any such allegations should not be involved in subsequent investigation(s) relating to the allegation(s).

(d) If the prosecutor's office concludes that there is a reasonable belief that personnel in any agency or department have engaged in unauthorized illegal conduct, the prosecutor's office should initiate a criminal investigation into the conduct or seek the initiation of such an investigation by an appropriate outside agency or office.

(e) If the prosecutor's office concludes that there was not unauthorized illegal conduct, but concludes that there was incompetence or non-criminal misconduct, the prosecutor's office should take appropriate action to notify the relevant agency or department, and if within the prosecutor's own office, to impose sanctions for the conduct.

(f) Decisions on how to respond to allegations of unauthorized illegal conduct, misconduct, or significant incompetence should generally be made without regard to adverse consequences on pending cases or investigations.

### **STANDARD 3.2 PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED JUDICIAL MISCONDUCT**

(a) Although judges are not exempt from criminal investigation, the prosecutor's office should protect against the use of false allegations as a means of harassment or abuse that may impact the independence of the judiciary.

(b) If a line prosecutor has reason to believe that there is significant misconduct or illegal activity by a member of the judiciary, the line prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.

(c) Upon receiving from a line prosecutor, or from any source, an allegation of significant misconduct or illegal conduct by a member of the

judiciary, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.

(d) If the prosecutor's office has a reasonable belief that a member of the judiciary has engaged in criminal conduct, the prosecutor's office should initiate, or seek the initiation of, a criminal investigation.

(e) If the prosecutor's office concludes that a member of the judiciary has not engaged in illegal conduct, but has engaged in non-criminal misconduct, the prosecutor's office should take appropriate action to inform the relevant officer of the judicial authorities. Reporting may also be required to comply with requirements of the applicable rules of professional conduct, the Model Rules and the law of the jurisdiction.

(f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a judge before whom the prosecutor's office practices. In some instances, this may require the appointment of a "pro tem" or "special" prosecutor or use of a "fire-wall" within the prosecutor's office.

**STANDARD 3.3 PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED MISCONDUCT BY DEFENSE COUNSEL**

(a) Although defense counsel are not exempt from criminal investigation, the prosecutor's office should protect against the use of false allegations as a means of harassment or abuse that may impact the independence of the defense counsel or the Constitutionally protected right to counsel.

(b) If a line prosecutor has reason to believe that defense counsel is engaging in criminal conduct, is violating the duty to protect a client, or is engaging in unethical behavior or misconduct, the prosecutor should promptly report that belief and the reasons for it to supervisory personnel in the prosecutor's office.

(c) Upon receiving from a line prosecutor, or from any source, an allegation of misconduct or illegal conduct by defense counsel, a supervisory prosecutor should undertake a prompt and objective review of the facts and circumstances.

(d) If the prosecutor's office has a reasonable belief that defense counsel has engaged in illegal conduct, the prosecutor's office should initiate, or seek the initiation of, an investigation into the conduct.

(e) If the prosecutor's office concludes that defense counsel has not engaged in illegal conduct, but has engaged in non-criminal misconduct as defined

by the governing ethical code and the rules of the jurisdiction, the prosecutor's office should take appropriate action to inform the appropriate disciplinary authority.

(f) The prosecutor's office should take reasonable steps to assure the independence of any investigation of a defense counsel including, if appropriate, the appointment of a pro tem or special prosecutor or use of a "fire-wall" within the prosecutor's office. At a minimum, an investigation of defense counsel's conduct should be conducted by a prosecutor who has not been involved in the initial matter or in ongoing matters with that defense counsel.

(g) The prosecutor investigating defense counsel should consider whether information regarding conduct by defense counsel should be provided to a judicial officer involved in overseeing aspects of the investigation in which the misconduct occurred.

(h) The prosecutor investigating defense counsel who is representing a client in a criminal matter under the jurisdiction of the prosecutor's office ordinarily should notify the attorney and the court in a timely manner about the possibility that potential charges against the attorney may create a conflict of interest.

**STANDARD 3.4 PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED MISCONDUCT BY WITNESSES, INFORMANTS OR JURORS**

(a) If a line prosecutor has reason to believe that there has been illegal conduct or non-criminal misconduct by witnesses, informants, or jurors, the prosecutor should seek supervisory review of the matter.

(b) Upon receiving an allegation of unauthorized illegal conduct or non-criminal misconduct by witnesses, informants or jurors, the prosecutor's office should undertake a prompt and objective review. If there is a reasonable belief that there has been illegal conduct or non-criminal misconduct, the prosecutor's office should initiate an investigation into the conduct. All relevant evidence should be preserved in the event it must be disclosed if criminal charges are filed against the individual alleged to have engaged in the conduct.

(c) If the misconduct relates to the official duties of a juror or witness, it must also be reported to an appropriate judicial officer.

**STANDARD 3.5 ILLEGALLY OBTAINED EVIDENCE**

(a) If a prosecutor reasonably believes that evidence has been illegally obtained, the prosecutor should consider whether there are potential criminal acts

that should be investigated or misconduct that should be addressed or reported. The prosecutor should be familiar with the laws of their jurisdiction regarding the admissibility of illegally obtained evidence.

(b) The prosecutor should take appropriate steps to limit the taint, if any, from the illegally obtained evidence and determine if the evidence may still be lawfully used.

(c) The prosecutor should notify the parties affected by the illegal conduct at the earliest time that will not compromise the investigation or subsequent investigation, or at an earlier time if required by law.

**STANDARD 3.6** RESPONDING TO POLITICAL PRESSURE AND CONSIDERATION OF THE IMPACT OF CRIMINAL INVESTIGATIONS ON THE POLITICAL PROCESS

(a) The prosecutor should resist political pressure intended to influence the conduct, focus, duration or outcome of a criminal investigation.

(b) The prosecutor should generally not make decisions related to a criminal investigation based upon their impact on the political process

(c) When, due to the nature of the investigation or the identity of investigative targets, any decision will have some impact on the political process (such as an impending election), the prosecutor should make decisions and use discretion in a principled manner and in a manner designed to limit the political impact without regard to the prosecutor's personal political beliefs or affiliations.

(d) The prosecutor should carefully consider the language in Standard 1.5 ("Contacts with the Public During the Investigative Process") when making any statements or reports regarding a decision to prosecute, or to decline to prosecute, in a matter that may have some impact on the political process.

**STANDARD 3.7** REVIEW AND OVERSIGHT OF CRIMINAL INVESTIGATIONS BY GOVERNMENT AGENCIES AND OFFICIALS

(a) Prosecutors' offices should attempt to respond in a timely, open, and candid manner to requests from public officials for general information about the enforcement of laws under their jurisdiction or about law reform matters. However, if public officials seek information about ongoing or impending investigations, the prosecutors' offices should consider the potential negative impact of providing such information and should inform public officials about such concerns.

(b) Generally, responses to public officials should be made by high-ranking officials in the prosecutor's office who have policy-making authority. Prosecutors' offices should resist allowing line-attorneys to respond to requests for information by public officials.

(c) Generally, responses to information requests by public officials should be through testimony or by providing pertinent statistics and descriptive and analytical reports, and not by providing information about particular matters. Prosecutors' offices should resist requests for materials that are subject to deliberative process or work product privileges related to pending criminal investigations or closed investigations whose materials have not otherwise been made public, and should oppose disclosure of information that would adversely affect a person or entity.

(d) Prosecutor's offices may respond to requests about the handling of fully adjudicated cases. Absent unusual circumstances, information about adjudicated cases should be provided by high-ranking officials with policy-making authority, and not by line attorneys.

(e) The Prosecutor's office should establish clear and consistent policies to address its responsibilities under public disclosure laws and with regard to the public's potential access to closed matters. The Prosecutor's office should provide sufficient resources to make prompt and appropriate replies to any public disclosure requests.

